IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13900 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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CHIMANLAL CHATURBHAI PATEL

Versus

PRAFULKUMAR LAXMANBHAI PATEL

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Appearance:

1. Special Civil Application No. 13900 of 2004

MR PK JANI for Petitioner No. 1-3

MR SK JHAVERI for Respondent No. 1

MR TEJAS P SATTA for Respondent No. 1

MR HS MUNSHAW for Respondent No. 2

MR PR ABICHANDANI ASST GOVT PLEADER for Respondent No. 3

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CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: 17/02/2005

ORAL JUDGEMENT

Rule. Shri S.K.Jhaveri, the learned advocate appearing on behalf of the respondent No.1 and Shri P.R.Abichandani, the learned AGP waives service of Rule for respondent No.3.

With the consent of the learned advocates for the parties, the matter is taken up for final hearing today.

.RS 2.

#. In this petition under Articles 226 and 227 of the Constitution of India, the petitioners have challenged the legality and validity of the judgment and order dated 28.6.2004 / 30.9.2004 passed by the Secretary, Revenue Department (Appeals) in Revision Application No.25 of 2002 in partly allowing the said revision application filed by the respondent No.1 herein and remanding the matter to the District Development Officer, Mehsana by quashing and setting aside the order passed by the District Development Officer, Mehsana passed in a revised Non Agricultural Use Permission [ for short "N.A.Permission" ] and directing the District Development Officer, Mehsana to consider grant of revised N.A.Permission considering the right of way in light of the village map.

#. The dispute is with regard to the right of way from the land bearing Survey No.396 and 397. The petitioners claim to be the owner of the land bearing Survey No.393. The N.A.Permission was sought for by the occupier of the land bearing Survey No.391 situated at village - Kansa, Taluka Visnagar Shri Chaturbhai Nagardas Patel and the District Development Officer, Mehsana by its order dated 9.7.1990 granted such permission by giving right of way from the land bearing Survey No.396. The occupier of the land bearing Survey No.396 subsequently submitted an application for N.A.Permission for the purpose of residential use to the District Development Officer, Mehsana and the District Development Officer, Mehsana by order dated 19.1.2002 granted the permission. As the petitioners felt that by virtue of N.A.Permission granted in respect of the land bearing Survey No.396 and 397, it has affected their right of way and therefore, they submitted an application before the District Development Officer, Mehsana and the District Development Officer by its order dated 22.4.2002 added / inserted condition No.27 in the order dated 19.1.2002 to the effect that as per the order passed by the District Development Officer, Mehsana dated 9.7.1990, while sanctioning the plan, the applicant of the land bearing Survey No.396 should give a right of way to the owner of the land bearing Survey No.393.

Being aggrieved and dissatisfied with the order passed by the District Development Officer, Mehsana dated 22.4.2002 in adding, inserting and / or imposing condition No.27 in the order dated 19.1.2002, the respondent No.1 preferred revision application before the Secretary, Revenue Department (Appeals), State of Gujarat being Revision Application No.25 of 2002 and Secretary, Revenue Department (Appeals), State of Gujarat after holding that the District Development Officer has not considered the inquiry in respect of right of way from the land bearing Survey No.396, 397, 393 while granting N.A. Permission and has not clarified the same and therefore, by impugned order dated 30.9.2004 partly allowed the said revision application and remanded the matter to the District Development Officer to clarify the dispute with regard to right of way considering the village map, which has given to filing of the present special civil application under Articles 226 and 227 of the Constitution of India.

#. Shri P.K.Jani, the learned advocate appearing on behalf of the petitioners has vehemently submitted that in view of the fact that while passing the order / sanctioning the plan submitted by the owner and / or occupier of the land bearing Survey No.393, the District Development Officer, Mehsana while sanctioning the said plan vide order dated 9.7.90 has already clarified and had given right of way from the land bearing Survey No.396 and therefore, the Secretary, Revenue Department (Appeals), State of Gujarat ought not to have quashed and set aside the order passed by the District Development Officer, Mehsana dated 22.4.2002 and ought not to have remanded the matter. It is further submitted that as such, the owner and occupier of the land bearing Survey No.393 which are already using the said way from the land bearing Survey No.396 and therefore, submission is that while remanding the matter and quashing and setting aside the order passed by the District Development Officer, Mehsana dated 22.4.2002 if the order of status quo is not granted, then the respondent No.1 and the occupiers of the land bearing Survey No.396 would construct the wall and would ultimately restrain the petitioners and occupiers of land bearing Survey No.393 from using the said way from land bearing Survey No.396. It is, therefore, submitted to allow the present special civil application as prayed for.

#. Shri S.K.Jhaveri, the learned advocate appears for the respondent No.1, and Shri P.R.Abichandani, the learned AGP is appearing on behalf of the respondent

No.3. Shri S.K.Jhaveri, the learned advocate for the respondent No.1 has submitted that the question with regard to right of way cannot be decided by the authority while granting non agricultural use permission and if the petitioners are of the opinion that they have got right of way from the land bearing Survey No.396 then, they are required to approach the competent Civil Court for the purpose of determination of their rights. It is also submitted by the learned advocate Mr.Jhaveri that the petitioners are already having a right of way from land bearing Survey No.401 and 402 and that the occupiers of the land bearing Survey No.393 had never used any way from land bearing Survey No.396. Lastly, it is submitted that when the dispute is with regard to a right of way, cannot be decided by the authority while granting the N.A.Permission, the order passed by the District Development Officer, Mehsana dated 22.4.2002 has been rightly quashed and set aside by the Secretary, Revenue Department (Appeals), State of Gujarat and therefore, requested to dismiss the present special civil application.

#. Shri P.R.Abichandani, the learned AGP has tried to support the order passed by the Secretary, Revenue Department (Appeals), State of Gujarat and it is submitted that when the revisional authority has found that while the order dated 22.4.2002 adding and / or imposing Condition No.27 in the order dated 19.1.2002, the District Development Officer, Mehsana not considered certain aspects of the matter and when the matter is remanded, it cannot be said that there is illegality committed by the Secretary, Revenue Department (Appeals), State of Gujarat which requires interference by this Court in exercise of the powers under Article 226 and 227 of the Constitution of India and therefore, requested to dismiss the present special civil application.

#. Heard the learned advocates appearing on behalf of the respective parties. It is the case of the petitioners that while sanctioning the plan for the purpose of putting up construction in the land bearing Survey No.393, the District Development Officer, Mehsana in its order dated 9.7.1990 has already sanctioned the plan giving right of way to the occupiers of the land bearing Survey No.393 from the land bearing Survey No.396 and therefore, it is contended that the order passed by the District Development Officer, Mehsana dated 22.4.2002 adding / imposing Condition No.27 in the order dated 19.1.2002 granting N.A. Permission to the owner / occupier of the land bearing Survey No.396, is just and proper and in consonance with the order passed by the

District Development Officer, Mehsana dated 9.7.1990 and the District Development Officer vide order dated 22.4.2002 has only clarified the position which was there while passing the order dated 9.7.1990. It is also the contention of the respondent No.1 that the question with regard to right of way cannot be decided by the authority granting N.A.Permission and that they are already having another right of way and they have no any other way in land bearing Survey No.396. Considering the fact that the District Development Officer, Mehsana at the time of granting and passing the order dated 22.4.2002 imposed condition NO.27 in the order dated 19.1.2002 by which the N.A.Permission was granted in favour of the owner / occupier of the land bearing Survey No.396, the District Development Officer, Mehsana has not clarified certain aspects with regard to the right of way of the land bearing Survey No.393 considering the village map and therefore, Secretary, Revenue Department (Appeals), State of Gujarat has remanded the matter to the District Development Officer, Mehsana. Under the circumstances, as such, the present special civil application is filed against the order of remand and the District Development Officer is required to take a decision afresh on the basis of the observations made by the Secretary, Revenue Department (Appeals), State of Gujarat in its order dated 30.9.2004. It is also required to be noted at this stage that so far as the order passed by the Secretary, Revenue Department (Appeals), State of Gujarat remanding the matter to the District Development Officer, Mehsana to clarify the question with regard to right of way considering the village map etc., the respondent No.1 has not challenged the same before the higher forum by way of preferring writ petition, and has not challenged the said order. Therefore, so far as the respondent No.1 is concerned, the said order has become final. Under the circumstances, the contention on behalf of the respondent No.1 that the authority granting the N.A. Permission has no authority to consider the question with regard to right of way, cannot be accepted at this stage. On remand, the matter is at large before the District Development Officer, Mehsana and all the parties are entitled to raise all the contentions which are available to them under the law. Under the circumstances, when the present special civil application is against the order of remand only, and the matter will be at large before the District Development Officer, Mehsana, the present special civil application is not entertained. It is also the contention raised on behalf of the petitioners that the petitioners who are occupiers of the land bearing Survey No.393 are already using their right of way from land bearing Survey No.396, for which, the learned

advocate on behalf of the petitioners has relied upon certain photographs which are at Annexure-V to the petition. Shri Jhaveri, the learned advocate for the respondent No.1 has disputed the aforesaid factum and has denied that the petitioners are using the right of way from the land bearing Survey No.396. Without going into further merits of the same till the District Development Officer, Mehsana takes an appropriate decision on remand pursuant to the order passed by the Secretary, Revenue Department (Appeals), State of Gujarat vide order dated 30.9.2004 in Revision Application No.25 of 2002, the parties are directed to maintain status quo as on today and the District Development Officer, Mehsana is directed to complete the proceedings on remand as early as possible, preferably within a period of two months from the date of receipt of copy of this order.

#. Accordingly, the order passed by the Secretary, Revenue Department (Appeals), State of Gujarat vide order dated 30.9.2004 in Revision Application No.25 of 2002 is modified and / or clarified to the aforesaid extent with regard to maintaining status quo as on today and the rest of the order passed by the revisional authority will stand unaltered and confirmed.

Rule is made absolute to the aforesaid extent with no order as to costs.

Direct Service is permitted.

Date : 17.2.2005 [ M.R.Shah, J.]

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